BLANK PAGE

IN THE

Supreme Court of the United States

October Term, 1940

No. 48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation,
Respondent.

PETITION OF RESPONDENT FOR REHEARING.

FREDERICK J. MILLER,
Ryan Block,
Little Falls, Minnesota,
JOHN L. CONNOLLY,
900 Fauquier Avenue,
Saint Paul, Minnesota,
G. BURGESS ELA,
1 West Main Street,
Madison, Wisconsin,
Attorneys for Respondent.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

BLANK PAGE

SUBJECT INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

October Term, 1940

No. 48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation,

Respondent.

PETITION FOR REHEARING.

Now comes the above named, Minnesota Mining and Manufacturing Company, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

I.

JURISDICTION.

This case was argued November 20, 1940; decided and judgment entered December 16, 1940. The time for filing a petition for a rehearing, under the rules of this Court (Rule No. 33), has not been shortened or enlarged, and

will expire January 10, 1941. This petition for rehearing is presented before January 10, 1941.

II.

REASONS FOR PETITION FOR REHEARING.

a. The Supreme Court of the State of Wisconsin, in the case of *Froedtert G. & M. Company, Inc. v. Tax Commission*, 221 Wisc. 225, 265 N. W. 672, and in the case of *J. C. Penny Company v. Tax Commission*, 233 Wisc. 286, 289 N. W. 677, held the tax to be an excise tax upon a privilege.

b. The Attorney General, who represented the State of Wisconsin, and Elmer E. Barlow conceded in their argument and in the brief that this tax was an excise tax upon a privilege or a transaction.

c. In the majority opinion (Wisconsin v. J. C. Penny Company), this Court held that the practical operation of Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax, Wisconsin taxed corporate income that is taken in; but the privilege dividend tax of 1935 superimposed upon this income tax a tax on corporate income that is paid out.

d. The Minnesota Mining and Manufacturing Company, the petitioner herein, has had no opportunity to present to this Court, either by argument or brief, the following views:

1. The tax imposed by the State of Wisconsin is not an additional income tax upon a corporation.

The majority opinion on page 249 reviews the history of the income tax law in Wisconsin as it applied to corporate dividends. The first income tax law enacted in the State of Wisconsin was Chapter 658, Laws of Wisconsin of 1911. A special Wisconsin feature was the exemption of dividends from personal taxation. This so-called "special Wisconsin feature" for years has applied to an individual Wisconsin taxpayer if, and only if, the corporation declaring the dividend had its principle business attributable to Wisconsin; that is, if 50 percent or more of the entire net income of the corporation were used in computing the average taxable income of the corporation under the Wisconsin income tax law. For many years, and at the present time, dividends from corporations—foreign or domestic—paid to Wisconsin stockholders which do not have 50 percent of their business attributable to Wisconsin are taxed for normal income tax purposes.

The case, *Welch v. Henry,* 305 U. S. 134, referred to in the majority opinion, involved an emergency surtax which taxed corporate dividends received by individual resident stockholders even though the principle business of the corporation declaring the dividends was attributable to Wisconsin within the meaning of the income tax law. The dividends from foreign corporations (which, in the great bulk of instances, did not have 50 percent of their business attributable to Wisconsin) were taxed for income tax purposes upon receipt thereof, upon Wisconsin residents; while, in the great bulk of cases, Wisconsin domestic corporations (which, in the great bulk of cases, would have 50 percent or more of their business

attributable to Wisconsin) were not taxed by virtue of the exemption; however, there was no blanket exemption of all dividends from taxation within the State of Wisconsin, as inferred in the majority opinion. In other words, the exemption from tax of dividends, referred to in the majority opinion, was for dividends received in the bulk of cases from local corporations and not from foreign corporations.

Wisconsin has had a longer experience in enacting and collecting income taxes, both on individuals and corporations, than the Federal Government; and in the past has had no particular difficulty in enacting legislation which tax individuals but not corporations; or, tax corporations and not individuals. In this connection, in 1921 the legislature of the State of Minnesota imposed an additional income tax upon corporations doing business in the State of Wisconsin. This is Chapter 459, Laws of Wisconsin, 1921, Section 71.26(2). From a review of the history of income tax and the different statutes enacted imposing taxes upon corporations and individuals and particularly with reference to a tax upon dividends received by residents regardless of the source, it is apparent that Wisconsin, when it enacted the privilege dividend tax law, was adopting a novel procedure to tax dividends received by a resident of a state other than Wisconsin (which it concededly could not do).

2. The tax, whether an excise or an income tax, is a tax upon a stockholder. This Court on April 22, 1940, in unanimous opinion in the case of *Colorado National Bank v. Bedford,* 310 U. S. 40, 84 L. ed. 1067, speaking through Mr. Justice Reed, said:

"The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by Section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax."

This Court has determined in several other analogeous cases that the tax is against the party who is ultimately burdened therewith.

United States v. Baltimore & Ohio R. R. Co., 84 U. S. 322, 21 L. ed. 597.

Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571.

Merchants' & Manufacturers' Nat. Bank of Pittsburgh v. Commonwealth of Pennsylvania, 167 U. S. 461, 17 S. Ct. 829.

Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 44 S. Ct. 23.

United States v. Commissioners of Sinking Fund, 169 U. S. 249, 18 S. Ct. 358.

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358.

Oliver v. Washington Mills, (Mass.), 11 Allen 268.

First National Bank v. Chehalis, 166 U. S. 440, 17 S. Ct. 629.

First National Bank v. Kentucky, 9 Wall. 468.

3. If the tax is an income tax (which is not conceded), it is an income tax upon the stockholder and violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

4. If it is an income tax, either upon the corporation or the stockholder, it is retroactive and void as it violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

The statute provides that dividends shall be presumed to have been paid out of earnings of the payor corporation attributable to Wisconsin under the provisions of Section 71 for the year immediately preceding the payment of the dividends, and if the corporation had a loss for the year prior to the payment of the dividends, the Tax Commission is authorized to determine the portion of the dividends paid out of corporate surplus and the profits derived from business transacted and property located within the State of Wisconsin.

If this tax is to be classed as an additional income tax upon a corporation, the unconstitutional retroactive features of it may be best illustrated by the following example:

The *A* corporation, doing business in Wisconsin, had net earnings in 1930 from Wisconsin equal to 10 percent of its total earnings. It paid no dividends in 1930, nor in any year until 1939. It had no income for the years 1931 to 1938, both inclusive. On January 2, 1939, it

paid a dividend under the law; 10 percent of this dividend would be subject to the Wisconsin Privilege Dividend Tax at the rate of 2½ percent in 1939, which, according to the majority opinion, is an additional income tax upon the corporation for the year 1930. Here we have a situation where an event taking place in 1939 subjects a corporation's income for 1930 to an additional tax. Such a retroactive tax is void. (*Nichols v. Coolidge,* 274 U. S. 531, 71 L. ed. 1184.)

5. The tax, if an additional income tax upon a corporation, denies the corporation the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. (*Colgate v. Harvey,* 296 U. S. 403, 80 L. ed. 299.)

The privilege dividend tax law in question imposed a tax on "such dividends declared and paid by all corporations (foreign and domestic) after the passage and publication of this act and prior to July 1, 1937."

The law was enacted and became effective September 26, 1935. Thus under the original enactment of the law only those dividends declared and paid between September 26, 1935 and July 1, 1937, were subject to a tax. Thus two corporations having the same income would have different amounts of income tax to pay for the year 1936. For example, Corporation *A* declared and paid a dividend September 1, 1937; therefore, it had no additional income tax for 1936. Corporation *B*, on the other hand, declared and paid a dividend June 1, 1937—thereby subjecting itself to an additional income tax for 1936.

6. We have understood that this Court, in reviewing a decision of the State Court, has consistently adhered

to the rule that its function is confined to determining whether the law, as applied to the facts in the case, produced an unconstitutional result; in other words, the decisions of the highest court of the state were controlling as to the meaning and effect of its own laws, and this Court would not interfere unless the decisions produced an unconstitutional result.

In the instant case the Supreme Court of Wisconsin held that the law, as enacted, violated the Fourteenth Amendment to the Federal Constitution. As we understand the decisions in the past, this Court would be bound by such a holding; where, if the converse were true, and the Supreme Court of Wisconsin decided that the law did not contravene the Fourteenth Amendment to the Federal Constitution, when in fact it did, it would be the duty of this Court, under its prior decisions, to reverse the Supreme Court of the State of Wisconsin. We know of no decision of this Court holding otherwise; surely the case of *Henderson v. Wickham*, 92 U. S. 259, 268, 23 L. ed. 543, 547, and the case of *Lawrence v. State Tax Commission*, 286 U. S. 276, 280, 76 L. ed. 1102, 1105, cited in the majority report of *Wisconsin v. J. C. Penney Company*, do not. They support the rule contended for herein. In the case of *Henderson v. Wickham*, the law, as construed by the State Court, violated the Federal Constitution; and this Court reversed. The case, *Lawrence v. State Tax Commission*, does not announce any different rule.

III.

PUBLIC INTEREST.

The principle involved in this case is important, not alone because of the amount of tax involved in the instant case, but also by reason of the departure by the Court from accepted principles governing state taxation. It is impossible to predict the effect this decision may have upon other tax questions involving extra territoriality or upon established conceptions of certain taxes falling within a given classification. We do not wish to be understood as contending that the fact this Court decided this case upon questions not briefed or argued by either side to be outside the province of the Court; but we do feel that due to the importance of this case, not only to this taxpayer but to the public generally, an opportunity be afforded us to present our views upon the foregoing questions.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Wisconsin Supreme Court be, upon further consideration, affirmed.

Respectfully submitted,

FREDERICK J. MILLER,
Ryan Block,
Little Falls, Minnesota,
JOHN L. CONNOLLY,
900 Fauquier Avenue,
Saint Paul, Minnesota,
G. BURGESS ELA,
1 West Main Street,
Madison, Wisconsin,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, JOHN L. CONNOLLY, counsel for the above named Minnesota Mining and Manufacturing Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John L. Connolly

Counsel for Petitioner.

BLANK PAGE

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1940.

State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners, *vs.* Minnesota Mining and Manufacturing Company.	On Writ of Certiorari to the Supreme Court of Wisconsin.

[December 16, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case, involving another application of the Wisconsin Privilege Dividend Tax considered in *Wisconsin v. J. C. Penney Co.*, No. 46, decided this day, is governed by that decision except for a contention made by this respondent but not pressed here in *Penney's* case.

The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state, *Matson Navigation Co. v. State Board*, 297 U. S. 441. That liability for such a tax is made contingent upon later happenings, as in the circumstances of the present case, makes no difference.

Reversed and remanded.

The Chief Justice, Mr. Justice McReynolds, Mr. Justice Roberts, and Mr. Justice Reed dissent for the reasons stated in the dissenting opinion in No. 46.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END